

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In re

**DETERMINATION OF RATES AND TERMS
FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

JOINT SUBMISSION RE EXPIRATION OF PHONORECORDS III RATES & TERMS

Google LLC, Spotify USA Inc., and Pandora Media, LLC (the “Undersigned Parties”) hereby inform the Copyright Royalty Judges that—notwithstanding their use of the case caption assigned by the Judges at the start of this proceeding and the Judges’ finding, affirmed in *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020), that Participants had agreed to the retroactive application of rates set in *Determination of Rates and Terms for Making and Distributing Phonorecords*, 16-CRB-0003-PR (“*Phonorecords III*”) to January 1, 2018—the *Phonorecords III* participants *were not*,¹ and *are not now*, in agreement that the rates and terms

¹ The Undersigned Parties maintain that if any agreement as to the effective period for the *Phonorecords III* rates and terms ever existed, that agreement was withdrawn in the Services’ May 2017 Joint Reply to the Copyright Owners’ Proposed Findings of Fact and Conclusions of Law—which Amazon joined. *See Phonorecords III*, Dkt. No. 14087 at 487 (stating January 1, 2018 would be a proper effective date for rates to be determined in this proceeding “*only if the Judges publish their determination in the Federal Register in November of 2017,*” and citing 17 U.S.C. Section 803(d)(2)(B) for the proposition that such rates shall remain in effect “*until such successor rates and terms become effective*” (emphasis added)).

set in this proceeding shall expire on December 31, 2022.²

As evident in the *Phonorecords III* participants' recent filings on the *Phonorecords IV* docket, there is *no agreement* among the participants in this proceeding that the *Phonorecords III* rates and terms shall expire on December 31, 2022. See *Determination of Rates and Terms for Making and Distributing Phonorecords* (“*Phonorecords IV*”), 21-CRB-0001-PR, Dkt. Nos. 23895, 25133, Joint Movants' Reply Br. In Further Support Of Expedited Joint Mot. For Suspension Of Voluntary Negotiation Period And Subsequent Case Events And Deadlines (docket number pending). As a result, under Copyright Act, the *Phonorecords III* rates and terms will expire on the effective date of the rates and terms set in *Phonorecords IV*. Specifically, under 17 U.S.C. Section 115(c)(1)(E) the *Phonorecords III* effective period shall “end[] on the effective date of successor rates and terms,” absent agreement among the parties that the rates and terms should expire on a specific date. Given the lack of such agreement here, the default rule in Section 115(c)(1)(E) applies.

The Undersigned Parties have filed a motion (together with the NMPA) on the *Phonorecords IV* docket to stay the voluntary negotiation period in that proceeding until the parties have the benefit of the Judges' determination on remand in *Phonorecords III*. See *Phonorecords IV*, 21-CRB-0001-PR (2023-2027), Dkt. No. 23895 (Expedited Joint Motion For

² Indeed, if anything, *Johnson* suggests that parties can “withdraw[] their prior agreement” as to dates—the D.C. Circuit simply found that, with respect to the start date of the *Phonorecords III* rates and terms (which had already come and gone by the time of the final determination and appeal), the Services had failed to do so in a timely manner. 969 F.3d at 378 (“Critically, ... when the Initial Determination included the same effective dates, ... the Streaming Services made no objection ... or otherwise communicated that they were withdrawing their prior agreement with the January 1, 2018 start date.”). To the extent any agreement as to the *end date* for the *Phonorecords III* rates and terms ever existed, it is not too late for any participant to withdraw its agreement now.

Suspension Of Voluntary Negotiation Period And Subsequent Case Events And Deadlines). As discussed in the reply brief in support of that motion, the *Phonorecords III* participants' lack of agreement as to when the *Phonorecords III* rates and terms will expire means that *Phonorecords IV* is not "a proceeding to determine successors to rates and terms that expire on a specified date" under 17 U.S.C. Section 803(c)(1), and therefore the Judges need not issue their *Phonorecords IV* determination by December 16, 2022 pursuant to that section. Though not required by any statute or regulation, the Judges' acknowledgment of the participants' lack of agreement will confirm the Judges' flexibility to stage the *Phonorecords III* and *Phonorecords IV* proceedings in the manner that will maximize judicial economy and promote the efficient resolution of both proceedings.

Date: May 12, 2021

Respectfully submitted,

/s/ Joseph R. Wetzel

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Proof of Delivery

I hereby certify that on May 12, 2021, I provided a true and correct copy of the JOINT SUBMISSION RE EXPIRATION OF PHONORECORDS III RATES & TERMS to the following:

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kelloggghansen.com

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

National Music Publishers Association (NMPA) et al, represented by Benjamin Semel, served via ESERVICE at Bsemel@pryorcashman.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Signed: /s/ Joseph R. Wetzel

Proof of Delivery

I hereby certify that on Wednesday, May 12, 2021, I provided a true and correct copy of the Joint Submission re Expiration of Phonorecords III Rates & Terms to the following:

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

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Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Signed: /s/ Joseph Wetzel